

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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	:
JOSEPH STEVENS & COMPANY, INC.,	:
	:
Peitioner,	:
	:
-against-	:
	:
DAVID CIKANEK,	:
	:
Respondent.	:
	:
-----X	

Civil Action No.  
07 CV 3385 (BSJ)

**DECLARATION OF MARTIN P. RUSSO  
IN SUPPORT OF APPLICATION TO VACATE  
  
EXHIBIT A**

1 object during counsel's opening statement  
2 because it's not permitted and it's rude and it  
3 breaks the flow, but I do object to some of the  
4 evidence he's claimed he's going to show you  
5 based on the fact that they relate to the  
6 Cikanek living trust which does not have a  
7 claim in this action. I move to strike those  
8 portions of the opening that relate to the  
9 Cikanek living trust.

10 This action was brought by Mr. Cikanek  
11 individually and he does have an individual  
12 account that he had at Joseph Stevens which was  
13 an IRA and he did have individual accounts at  
14 LCP, both an individual account and an IRA  
15 account at LCP until approximately September of  
16 2000, but the Cikanek living trust did not  
17 bring a claim in this case nor did it sign a  
18 submission agreement. Illinois statute 760  
19 ILCS 5 slash 4 basically says that only a  
20 trustee has the power to commence litigation on  
21 behalf of a trust. The statement second of  
22 trusts which has been cited in many cases here  
23 in Illinois says it's the trustee who must  
24 bring the claim on behalf of the trust and it's  
25 only the trust that can recover just -- and

1 that includes grantors are not permitted to  
2 bring a trust -- a claim on behalf of the trust  
3 nor are the beneficiaries of the trust  
4 permitted to bring a claim on the trust except  
5 for certain special circumstances which are not  
6 met here and I'll cite for you Godfrey versus  
7 Cayman 2000 U.S. District Lexis 18, 213; Pierce  
8 versus Chester Johnson Electric Corp., 117  
9 Illinois Appeals 3rd, 867;  
10 Levinfield (phonetic) versus Clinton, 1986 U.S.  
11 District Lexis 27, 109 and U.S. versus  
12 \$2,767,202.27 which is 2006 U.S. District Lexis  
13 47, 833, all of that law as well as the  
14 restatement of trust section 177, 192 and 282,  
15 that's the restatement of second of trusts.

16 In this case, the Cikanek living trust  
17 has beneficiaries that are not Mr. Cikanek.  
18 The beneficiaries are various brothers and  
19 sisters and their progeny and so Mr. Cikanek is  
20 not even the beneficiary of the trust but seeks  
21 here apparently to recover individually for a  
22 trust asset that being a claim a trust owns.  
23 Importantly, this -- the exclusion -- and I'm  
24 going to move to preclude any evidence with  
25 respect to the Cikanek living trust. The

1 preclusion of the Cikanek living trust would  
2 not, in fact, materially affect this case  
3 because the bulk of the losses that Mr. Cikanek  
4 suffered were with respect to his individual  
5 accounts which were at LCP and those losses  
6 occurred primarily between I think it's April  
7 of 2000 and September of 2000.

8 It was in September of 2000 that  
9 Mr. Cikanek created his trust. At the same  
10 time at LCP, he had an IRA account which  
11 suffered like something like several hundred  
12 thousand dollars worth of losses. That IRA  
13 account went to Joseph Stevens and did, in  
14 fact, suffer losses at Joseph Stevens and so  
15 the preclusion of the Cikanek living trust  
16 evidence will not in any way prevent this case  
17 from going forward. It would simply provide  
18 Joseph Stevens the due process of law and the  
19 reason why I say that is because the Cikanek  
20 living trust did not submit to arbitration,  
21 Joseph Stevens was unable to bring claims  
22 against the Cikanek living trust as a trust  
23 entity for a debit that they had incurred and  
24 was forgiven by Joseph Stevens in the amount of  
25 \$40,000 and, in addition, Joseph Stevens was

1       unable to cross-claim against Mr. Cikanek for  
2       his breach of fiduciary of care. As a trustee,  
3       he owed a duty of care to the trust and to  
4       protect the assets of the beneficiaries and so  
5       I ask you at this point to strike any portion,  
6       without specifics, of the opening that relate  
7       to that evidence and to going forward issue a  
8       ruling which precludes Mr. Sugarman and Mr.  
9       Cikanek from introducing evidence regarding the  
10      Cikanek living trust account which is not at  
11      issue in this case.

12                ARBITRATOR PEPPARD: Anything further,  
13      sir?

14                MR. RUSSO: No, sir.

15                MR. SUGARMAN: First of all,  
16      Mr. Chairman and members of the panel, I think  
17      this is the inappropriate time for this matter  
18      to have been raised. If Mr. Russo actually  
19      believed that he had a legal motion of this  
20      sort where he was going to be citing cases  
21      trying to preclude or claim that there is a  
22      certain party not involved, he's been more than  
23      well aware that Mr. Cikanek's individual  
24      account which was a living trust account was  
25      part of this case, he could have made this

1 motion, could have made a written motion, could  
2 have responded to it.

3 To raise this at this point before  
4 we've introduced any testimony or evidence I  
5 think is premature and early. If he wants to  
6 raise it at the end of our case, I suppose  
7 that's also possible, but, number 2, he's  
8 raising a very technical issue because clearly  
9 they don't have any other way of defending this  
10 case and I don't think that this is an  
11 arbitration that such a technical issue is a  
12 legitimate basis to bar Mr. Cikanek who is a  
13 living trust when he is the only trustee and we  
14 have no problem to take care of this very  
15 technical issue that's being raised.

16 Mr. Cikanek can submit or sign a  
17 uniform submission agreement on behalf of the  
18 trust. We could also move to amend our  
19 pleading at the end of our case to include the  
20 trust and we could submit, as I said, a uniform  
21 submission agreement, if possible -- you know,  
22 if necessary; however, I don't believe that at  
23 this point there is any grounds or basis to  
24 have this excluded from introducing any  
25 evidence to this including the fact that

1 Mr. Cikanek's account recently was an  
2 individual account and at some point it changed  
3 to a living trust, so I really think that the  
4 motion is premature and also I think it's just  
5 a technicality that Mr. Russo is raising which  
6 has no basis and the argument I would finally  
7 argue and point out that this argument that  
8 they're precluded from bringing a counterclaim  
9 against Mr. Cikanek for breach of fiduciary  
10 duty is a specious argument because if you  
11 don't represent the beneficiary of the trustee  
12 and to the extent there was some basis for a  
13 breach of fiduciary duty claim, that would be  
14 something that wouldn't be brought by Joseph  
15 Stevens who are the ones who facilitated and  
16 who were the basis for the living trust losing  
17 all the money being brought by the beneficiary,  
18 that's something that would be up to them to do  
19 and not Joseph Stevens, so their argument that  
20 they've somehow been denied some due process  
21 right or whatever I think is not a valid  
22 argument.

23 So I would suggest that this motion be  
24 denied and to the extent that counsel is  
25 concerned about some technicality, we'll move

1 to amend our pleadings and include the trust as  
2 a claimant and we'll submit a submission  
3 agreement on behalf the trust and Mr. Cikanek  
4 as the trustee.

5 MR. RUSSO: If I might be heard for one  
6 moment -- I'm sorry, were you done, I didn't  
7 mean to interrupt? If I could be heard for the  
8 moment, it's important to point out that there  
9 was never a Cikanek individual account other  
10 than the IRA at Joseph Stevens. The account  
11 didn't go to Joseph Stevens until November of  
12 2000 so the Cikanek living trust account was  
13 the only incarnation of this account at Joseph  
14 Stevens. Also, yes, Mr. Sugarman is right  
15 Joseph Stevens wouldn't bring a claim for  
16 breach of fiduciary duty, but they'll bring a  
17 claim for contribution based on his breach  
18 fiduciary duty.

19 It's still the same underpinnings and  
20 we can't possibly at this point in time do  
21 that. It's too late. We've started. The  
22 issued has been joined in this case. The  
23 claimant's opening has started. To try to  
24 amend now wouldn't be fair to Joseph Stevens  
25 and I have to point out there is nothing



1 preventing Mr. Cikanek from bringing a case  
2 against Joseph Stevens on behalf of the living  
3 trust properly as he should have.

4 In this case, the uniform submission  
5 agreement is very clear. It's David Cikanek  
6 individually and all of the pleadings are  
7 clear, it's David Cikanek individually and so  
8 we shouldn't have to come here and fight over  
9 the Cikanek living trust. We did not make --  
10 do certain things including bringing  
11 cross-claims and counterclaims based on the  
12 fact that this was an individual case.

13 MR. SUGARMAN: Could I say one brief  
14 response?

15 ARBITRATOR PEPPARD: Yes, sir.

16 MR. SUGARMAN: Thank you. Mr. Russo  
17 what he just stated I think points out why the  
18 motion should be denied against. It suggests  
19 we bring another claim against Joseph Stevens  
20 on the -- for the Cikanek living trust. The  
21 evidence and the testimony would be all the  
22 same, so he basically wants us to duplicate our  
23 efforts twice just as a matter of some  
24 technicality. It doesn't make any sense.  
25 That's what arbitrations are about. They're

1 supposed to avoid all of the legal  
2 technicalities that Mr. Russo is trying to  
3 raise and allow a party to present his case and  
4 present his evidence not to have to come here  
5 and then file the same claim again because the  
6 issue has supposedly been joined because I made  
7 an opening statement and then have us to  
8 introduce the same testimony over again. It's  
9 very simple.

10 If the panel is concerned about they're  
11 not being technically, the living trust as  
12 party can amend, we'll submit a submission  
13 agreement. The same evidence would be  
14 presented if we would bring another claim which  
15 would just be duplicative and a waste of  
16 everybody's time and effort, so I, again,  
17 suggest that the motion should be denied.

18 MR. RUSSO: That is factually  
19 incorrect. The evidence with respect to the  
20 Cikanek living trust involves different trades,  
21 different trading, different time periods.  
22 It's not the same evidence that would be  
23 introduced with respect to the IRA and also I'd  
24 like to point out that what Mr. Sugarman  
25 basically just did was say to you this is

1 arbitration so ignore the law, it doesn't  
2 matter that this claimant didn't bring a claim  
3 against them, just bring it in now and let's  
4 have some quick justice here and it's manifest  
5 disregard to the law if you do it.

6 MR. SUGARMAN: It is absolutely not  
7 manifest disregard to the law.

8 ARBITRATOR PEPPARD: Let's do a couple  
9 of things factually here if we can. First,  
10 Mr. Sugarman, what I have in my pleading file  
11 includes under date of April 7th, 2006, a  
12 letter formatted signed by yourself on behalf  
13 of Mr. Cikanek, you have that document?

14 MR. SUGARMAN: Yes, sir.

15 ARBITRATOR PEPPARD: So your statement  
16 of claim is in that format under that date  
17 signed by yourself on behalf of Mr. Cikanek.  
18 When I turn to the second page of that  
19 document, I see a reference to two accounts and  
20 it isn't clear to me what those two accounts  
21 are except that one of them is described as a  
22 margin account and the other by number is  
23 described as an IRA account. Can you give us a  
24 little more description of those?

25 MR. SUGARMAN: Absolutely. What's been

1 to do, sir.

2 ARBITRATOR PEPPARD: Oh, I beg your  
3 pardon. I thought we had done that.

4 MR. RUSSO: And I object to proceeding  
5 because it's going to cost us days.

6 ARBITRATOR PEPPARD: Your objection is  
7 heard, sir.

8 MR. RUSSO: I also have the problem  
9 which is right now if you're going to make us  
10 go forward, I need the opportunity to amend my  
11 answer to assert a counterclaim and a  
12 cross-claim, so I mean you can't go forward on  
13 the evidence with respect to one side without  
14 permitting me to go forward with the evidence  
15 on the other side.

16 The issue has been joined with respect  
17 to the individual account. If now there is  
18 even the chance that at some point later on the  
19 panel might decide that with respect to the  
20 Cikanek living trust that you're going to  
21 accept the evidence, then I will have been  
22 injured because I will not have been able to  
23 assert my counterclaim nor my cross-claim and  
24 so I urge you to consult with the full panel  
25 and to make a ruling either at this time or if

1       you cannot do that to adjourn and seek having  
2       the parties submit briefs or something like  
3       that because it's just not fair to Joseph  
4       Stevens from a due process standpoint for us to  
5       have to go forward without asserting our claims  
6       as they could have been asserted had the  
7       Cikanek living trust submitted a uniform  
8       submission agreement and agreed to be party to  
9       this action.

10                ARBITRATOR PEPPARD: Thank you very  
11       much. Do you have anything more by way of  
12       opening statement?

13                MR. RUSSO: Yes, I do.

14                ARBITRATOR PEPPARD: Let's hear that.

15                MR. RUSSO: The evidence in this case  
16       is going to show you that Joseph Stevens is not  
17       your run of the mill brokerage firm. It's a  
18       very implied brokerage firm. It's a firm that  
19       has put in very good procedures and that it's a  
20       victim of circumstance by virtue of the fact  
21       that Mr. Cikanek came to Joseph Stevens with  
22       Ross Inserra, Leonard Inserra and Kevin Brody.

23                Whatever those gentleman did at LCP,  
24       they did not do at Joseph Stevens and you'll  
25       see when you look at the evidence of both

1 transferred your account from -- your accounts  
2 from Silver Capital to Joseph Stevens?

3 A. Yes.

4 Q. Do you recall when that was?

5 A. Not offhand, no.

6 Q. Was it sometime in 2000?

7 A. Yes.

8 Q. And how did that come about, how did  
9 you come to transfer your accounts there?

10 A. Ross told me that he was moving to  
11 Joseph Stevens because there was some internal  
12 problems at Silver Capital.

13 Q. Internal problems?

14 A. Yes.

15 Q. And did Ross ask you to go with him to  
16 Joseph Stevens?

17 A. Yes.

18 Q. Follow him there?

19 A. Yes.

20 Q. And did you, in fact, transfer your  
21 account to Joseph Stevens?

22 A. Yes.

23 Q. Now, when you got to Joseph Stevens,  
24 did the manner in which you described your  
25 account being handled did it change in any way?

1 entity?

2 A. No.

3 Q. No. Why did you establish a trust?

4 A. To avoid -- I can't think of the word,  
5 it starts with a P, probate, and it would save  
6 me in taxes.

7 Q. You understood that this would be a  
8 vehicle that you could use to avoid probate and  
9 save taxes?

10 A. Yes.

11 Q. And you were seeking the protection of  
12 the laws of the state of Illinois in order to  
13 do that, correct?

14 A. No, I didn't think of it in that way.

15 Q. Did you have to go through a process  
16 and sign a legal document to establish a trust?

17 A. Yes.

18 Q. I hand you what I marked as  
19 Respondents' A, can you look at Respondents' A,  
20 sir, and tell me what that is?

21 A. It says trust agreement of David  
22 Michael Cikanek, David Menachof Law Office,  
23 6723 West Cermak Road, Berwyn, Illinois 60402.

24 Q. I'd ask you to look at the third from  
25 the last page or fourth from the last page, it

1 says page 13 at the bottom?

2 A. Page 14?

3 Q. Page 13 it says at the bottom.

4 A. Yes.

5 Q. Can you tell me whether your signature  
6 appears anywhere on this document, sir?

7 A. Yes.

8 Q. Where does it appear?

9 A. Below where it says testimonium clause,  
10 it says David M. Cikanek and that's my  
11 signature and it says David M. Cikanek,  
12 trustee.

13 Q. Did you, in fact, execute this  
14 document, sir?

15 A. Yes.

16 Q. Now, I ask you to turn to page 4 of  
17 this document, four at the bottom?

18 A. Page 4.

19 Q. Could I ask you who Darlene Simmons is?

20 A. She's my sister.

21 Q. And who is Rosemary Gretasi (phonetic)?

22 A. Gretasi, my sister.

23 Q. I believe you testified earlier that  
24 you were not married, sir; is that right?

25 A. Correct.



1 Q. And you've never been married?

2 A. Correct.

3 Q. Do you have any children?

4 A. No.

5 Q. Was the purpose of establishing this  
6 trust so that your assets would pass to your  
7 sister and -- your sisters and their children  
8 without having to go into probate?

9 A. No, it was to pass it along to them.  
10 It didn't -- I didn't bring probate into it.

11 Q. You just wanted to pass it along to  
12 them?

13 A. Yes.

14 Q. They were the beneficiaries of this  
15 trust?

16 A. Yes.

17 Q. And they still are the beneficiaries of  
18 this trust?

19 A. Yes.

20 Q. Are they still alive, sir, both of your  
21 sisters?

22 A. Yes.

23 Q. Now, we were asking you about income  
24 sources and you said one other income source  
25 was this real property, the income property

1 A. Yes.

2 Q. What did you do when you received a  
3 confirmation for your trade?

4 A. I looked at the value of the stock and  
5 the amount of money.

6 Q. Why were you looking at that?

7 A. Because I was concerned I was earning  
8 money or losing money.

9 Q. Well, I'm not talking about account  
10 statements, sir, I'm talking about individual  
11 confirmations for every trade?

12 A. Well, I was sent -- aware of what Ross  
13 was doing with my money and I wanted to see,  
14 you know, what -- where the money was going,  
15 what stock.

16 Q. So let's rewind a second, sir, did you  
17 or did you not receive a confirmation for every  
18 trade that was done in your account?

19 A. Yes.

20 Q. And when you got those confirmations,  
21 what did you do with them?

22 A. I looked at them and then I would call  
23 Ross and ask him about the trade.

24 Q. And you understood when you received  
25 those confirmations, did you not, sir, that a

1 trade had been done in your account?

2 A. Yeah, I understood that because it said  
3 trade confirmation.

4 Q. And how often did you call the firm LCP  
5 or Joseph Stevens and say I did not authorize  
6 this trade, please reverse it?

7 A. Never.

8 Q. Am I correct that after seeing the  
9 trade confirmations and discussing it with  
10 Ross, you accepted the trade?

11 A. I didn't know I could reject it at that  
12 point.

13 Q. You had no idea that you could say I  
14 didn't do this trade?

15 A. No.

16 Q. You never learned that throughout the  
17 entire time you were investing?

18 A. No, and Ross never told me I could.

19 Q. But clearly after you got stuck with a  
20 couple of trades you didn't want, you said to  
21 Ross I'm not sending you any more money; is  
22 that right?

23 MR. SUGARMAN: Objection, he's

24 mischaracterizing his testimony. He just

25 said --

1 BY MR. RUSSO:

2 Q. Let me ask did you ever get stuck with  
3 a trade you didn't want?

4 A. Yes, all the trades that lost money and  
5 as far as I'm concerned, they all lost money.

6 Q. So you weren't --

7 A. But I felt that I lost control of my  
8 portfolio and it was in the hands of Ross who I  
9 trusted and he assured me that there was no  
10 concern for alarm.

11 Q. At what point did you make the decision  
12 that you didn't want the trade, was it at the  
13 point that the trade was done that you received  
14 the confirmation or was it after the trade was  
15 closed and you lost money?

16 A. It's not -- the way I felt it's not  
17 that I didn't want the trade, I felt it was too  
18 late and what was done was done.

19 Q. Why didn't you instruct Mr. Inserra to  
20 sell the stock that he had purchased without  
21 your authorization?

22 A. Because they already lost money.

23 Q. But if you still had the stock, wasn't  
24 there a chance that you were going to continue  
25 to lose money?

1 A. There's always that chance.

2 Q. So you knowingly accepted that risk  
3 when you didn't instruct Mr. Inserra to sell,  
4 correct?

5 A. I -- Ross told me there was -- I  
6 shouldn't be alarmed, that it would come back.  
7 He would take care of it and it could come  
8 back.

9 Q. But you understood that there was a  
10 risk that you were going to lose money,  
11 correct?

12 A. Correct, because there is always a  
13 risk.

14 Q. And so in not instructing Mr. Inserra  
15 to immediately sell, you knowingly undertook  
16 that risk, didn't you?

17 A. Yes.

18 Q. Now, in addition to the confirmations,  
19 you also received monthly statements, correct?

20 A. Correct.

21 Q. And you had received the statement for  
22 the prior month about the middle of the  
23 following month, correct?

24 A. Correct.

25 Q. And while you were at -- while you had

1 Q. Let's assume for the moment --  
2 withdrawn.

3 Would you say you lost at least 400,000  
4 while you were at LCP?

5 A. I don't know for sure.

6 Q. Do you know whether it was hundreds of  
7 thousands that you lost at LCP?

8 A. Yes.

9 Q. After having lost hundreds of thousands  
10 at LCP, why is it that you followed Mr. Inserra  
11 to Joseph Stevens & Company?

12 A. I followed him because he asked me to.  
13 He said he would get my money back for me.

14 Q. At any point did you tell Joseph  
15 Stevens that you were dissatisfied with the  
16 stock that Mr. Inserra had been recommending to  
17 you because at LCP you had lost several hundred  
18 thousand dollars?

19 A. No.

20 Q. In fact, when you got to Joseph  
21 Stevens, you filled out a new account form,  
22 didn't you?

23 A. Yes.

24 Q. And on that new account form, you  
25 represented that you had a million in net

1           worth?

2           A.    No, I didn't.  Ross put that in.  I  
3           signed the form.

4           Q.    You signed the form and didn't you also  
5           sign the form that said you had 100,000 in net  
6           income?

7           A.    Ross also filled that in.

8           Q.    So Ross filled that out but you signed  
9           that, sir?

10          A.    Yes, but --

11          Q.    Okay.  Let me just ask --

12               MR. SUGARMAN:  Can he finish answering?

13               MR. RUSSO:  I'm asking yes or no  
14           questions.  I'd ask that counsel  
15           rehabilitate him if he needs to but that we  
16           move this along.

17               MR. SUGARMAN:  Chairman, he was in the  
18           middle of answering when he was cut off and  
19           I think he cut off his answer.

20               ARBITRATOR PEPPARD:  Did you have  
21           anything else to add, sir?

22               THE WITNESS:  Yeah, he had a sticker  
23           pointing to where I should sign.  Everything  
24           wasn't filled in and I just signed it and he  
25           would send a return overnight envelope.  He

1 JEFFREY E. SCHAFF

2 MR. RUSSO: I'd just like to note for the  
3 record my continuing objection to evidence with  
4 respect to the Cikanek living trust, is not a party  
5 to this action.

6 ARBITRATOR PEPPARD: We'll consider that  
7 you have a standing objection to all evidence with  
8 respect to the trust.

9 MR. RUSSO: Thank you, sir.

10 BY MR. SUGARMAN:

11 Q. Mr. Schaff, can you walk us through this  
12 profit and loss report starting with this account  
13 summary?

14 A. Most certainly.

15 The profit and loss reports and, actually,  
16 there are a number of tabs where they'll all appear  
17 to be generally similar, they're in the same format.  
18 The very first page for each would be the accounts  
19 summary. There are three boxes of information in  
20 each -- captioned by the exact account numbers but  
21 are time frames that are captioned profit and loss.

22 The two top boxes are two entirely  
23 different ways to generate a profit and loss. The  
24 first being simply cash flow. If you know how much  
25 monies, securities went into an account and out of